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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 461

In the Matter of

FEDERAL FACILITIES REALTY TRUST, a Common
Law Trust, and **NATIONAL REALTY TRUST**, a Com-
mon Law Trust,

Debtors,

STACY C. MOSSER, Successor Trustee of National
Realty Trust and Federal Facilities Realty Trust and
JOHN W. GUILD, Indenture Trustee, etc.,

Petitioners,

VS.

PAUL E. DARROW, Former Trustee of National Realty
Trust and Federal Facilities Realty Trust,

Respondent.

**BRIEF OF RESPONDENT PAUL E. DARROW, FOR-
MER TRUSTEE IN BANKRUPTCY IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT.**

STATEMENT OF THE CASE.

The "Summary Statement of the Matter Involved" in the Petition for Certiorari is biased and quite obviously slanted to suit the contentions of the petitioners. It also omits reference to a number of important and significant facts. We propose to correct some of those matters in the following Statement of the Case.

Paul E. Darrow, the Respondent, as Trustee of the two trusts here involved, was surcharged by the District Court in the amount of \$43,447.46 on account of alleged profits by two of his part-time employees, Myrtle Johnson and Jacob Kulp. These "profits" arose out of their sales of various bonds and other underlying securities of twenty-seven subsidiary corporations whose stock was owned by the two trusts—not only to Darrow as Trustee, but to numerous private customers of their Brokerage concern, the Colonial Securities Co.

There is no contention by petitioners that Darrow personally participated in or realized any profits from the transactions of his two part-time employees. During the more than eight years in which the transactions complained of took place, Darrow, as Trustee of Federal and National, purchased a large number of the bonds of the subsidiary corporations at depreciated prices from Johnson and Kulp, through the Colonial Securities Co., an independent securities company which they controlled.

With respect to the total surcharge against Darrow, the Court of Appeals made the following breakdown:

A.

"Sales by Employees Direct to Darrow

Profits on sales for account
of Federal\$ 4,051.60

Profits on sales for account
of National 4,572.50

Total profits on these sales to
Darrow \$ 8,624.10

B.

Sales by Employees to General
Public

Profits on sales of Federal
securities to general pub-
lic\$10,044.36

Profits on sales of National
securities to general pub-
lic 14,077.50

Total profits on sales to public 24,121.86

C.

Surcharge against Darrow for alleged
profits to employees in Seligman trans-
action \$10,701.50

Grand total surcharges against Darrow.. \$43,447.46"

It will thus be seen that on the sales of bonds made by Johnson and Kulp to Darrow, as Trustee, directly or through Colonial, they realized over the eight-year period an alleged profit of only \$8,624.10, or slightly over \$1,000 per year. The balance of the surcharge against Darrow, as found by the trial Court, was based on alleged profits made by these part-time employees on sales of bonds to various members of the public generally, who were total strangers to the two trusts.

With reference to the employment of Johnson and Kulp, the Court of Appeals made the following finding:

"After the appointment and qualification of Darrow, the former trustee, George Andresen, recommended to him that he employ Jacob Kulp and Myrtle Johnson to assist him. It was pointed out that they were well qualified to assist because of their intimate knowledge of the workings of the trusts and their subsidiaries. However, Miss Johnson and Kulp made it clear that

they would remain as part-time employees only on condition that they be allowed to continue to operate in the securities business through Colonial Securities Company. Darrow employed them on a part-time basis, and they continued to operate Colonial, in the same way that had been practised during their employment by the Andresen trust."

Large Profits to Both Estates Because of Services of Kulp and Johnson.

Largely because of the valuable assistance given to him by Miss Johnson and Mr. Kulp, Darrow, while Trustee of Federal and National, was able to successfully and satisfactorily reorganize in the bankruptcy court all of the twenty-seven subsidiary corporations owned by said trusts whose financial difficulties had been responsible for Federal and National's bankruptcy proceedings. The Court of Appeals found on this point:

"It was Darrow's policy, as trustee, to acquire by purchase outstanding defaulted bonds of the various subsidiaries. During the eight years of his trusteeship he persevered in that policy and bought from individual bondholders and from dealers in securities, including Colonial operated by Miss Johnson and Jacob Kulp, subsidiary bonds of the total par value of \$2,414,600. Due in large part to these purchases, the obligation of the subsidiaries (which were principally outstanding bonds) were reduced, during his eight years of trusteeship, from \$7,611,700 par value to \$5,197,100 par value.

These securities were purchased by Darrow partly for the debtor trusts, but the far greater part were acquired for the subsidiaries."

Thus the operations of Darrow's part-time employees have not to any extent whatever damaged the estates of National and Federal; but on the contrary, as the Court of Appeals found, their sales of bonds to Darrow as Trus-

tee benefited both estates by reducing the obligations of their subsidiary companies to the extent of \$2,414,600.00.

Moreover, the Court of Appeals found a large direct benefit to the two trusts themselves, as a result of the services of his employees, Kulp and Johnson. On this further point the Court of Appeals said:

"At the time of his resignation, he held as trustee for Federal and National \$437,800, in principal amount, of bonds which Darrow had acquired at a total cost of \$79,333.80. These bonds, on his resignation, had a market value of \$164,279, and in addition the debtor trusts, Federal and National had received on the bonds purchased for them the sum of \$45,907.15 in interest. Therefore, the appreciation in market value of the subsidiary bonds, plus the interest received thereon, establish as a benefit to the debtor trusts from the transactions in the bonds, which amounts approximately to the sum of \$130,700."

Under the facts it is not surprising that the Court of Appeals felt compelled to reverse the unjust surcharge against Darrow.

ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI.

I. THE PETITIONER MOSSER IS NOT A LAWFUL PARTY IN THIS COURT.

The Jurisdictional Statute.

The purported petitioner herein (Mosser as "Successor-Trustee" of the two bankruptcy estates involved) is not, and was not at the time of filing the petition, a "party to any civil . . . case" within the purview of Title 28 United States Code, Section 1254, concerning review by this Court by the "method" of *certiorari*. Accordingly Mosser, as purported "Trustee in Bankruptcy", has no right to invoke the jurisdiction of this Court in this proceeding. The Record shows that at the time the Petition for Certiorari was filed Mosser was not Trustee for either National Realty Trust or Federal Facilities Realty Trust. He had resigned his office as Trustee in each trust long before the date his Petition for Certiorari was filed in this Court.

The Facts as to Mosser Ceasing to Be Trustee.

The records of the District Court show the entry of the following orders covering this Petition for Certiorari: *

1. Order of the District Court entered on November 7, 1949 appointing one Frank Whiston as additional and Co-Trustee with Mosser of the National Realty Trust.

* Printed copies of the Certified Copies of these Orders are attached to this Brief as Appendix A.

The original Certified Copies of these Orders have been filed with the Clerk in these Proceedings.

2. Order of the District Court entered November 7, 1949 appointing one Joseph Schwartz as additional and Co-Trustee with Mosser of the Federal Facilities Realty Trust.
3. Order of the District Court entered October 17, 1950 accepting the resignation of Mosser as Trustee of National Realty Trust.
4. Order of the District Court entered October 26, 1950 authorizing Whiston, as sole Trustee of National Realty Trust, and Schwartz and Mosser, as Trustees of Federal Facilities Realty Trust, to file a Petition for Certiorari in this proceeding.
5. Order of the District Court entered on November 29, 1950 accepting the resignation of Mosser as Trustee of Federal Facilities Realty Trust.

The lawful effect of the Orders of October 17, 1950 (No. 3 above) and November 29, 1950 (No. 5 above) was to put an end forthwith to Mosser's office as Trustee for both National and Federal.

The order of the District Court of October 26, 1950 (No. 4 above) entered after Mosser had ceased to be Trustee of National Realty Trust but while he was still Co-Trustee of Federal Facilities Realty Trust, authorized only Whiston, as the sole Trustee of National, to file a Petition for Certiorari in these proceedings on behalf of National, and authorized Schwartz and Mosser, as Co-Trustees of Federal, to file such Petition on behalf of Federal. However, on December 1, 1950 Mosser also ceased to be Trustee of Federal by virtue of the Order of November 29, 1950 (No. 5 above). Thus the Petition for Certiorari in this Court, which was filed by Mosser on December 18, 1950 on behalf of both National and Federal, was so filed by him two months after he ceased to be Trustee of National and eighteen days after he ceased to be Trustee of Federal. He, therefore, at the time he filed the Petition herein, was a total stranger to these proceed-

ings in both Estates and had ceased to be a lawful or proper "party" to this proceeding within the meaning of the applicable provision of the United States Code to which we have referred above.

The Lawful Trustees Not Before the Court.

Neither Whiston, the lawful Trustee of National, nor Schwartz, the lawful Trustee of Federal, has filed any Petition for Certiorari to review the judgment of the Court of Appeals. They did not join with Mosser and accordingly are not before this Court. Why they did not do so does not appear, and we are at a complete loss to understand the unusual situation presented.

The Bankruptcy Statute on This Point.

That Whiston and Schwartz both had the right to file their petition for certiorari in this proceeding, had they desired to do so, is clearly established by the Bankruptcy Act (11 U. S. C. A., Sec. 24), which provides:

"The death or removal of a receiver or trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint receiver or joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint receiver or joint trustee alone or by such successor."

This Court Without Jurisdiction of This Petition.

Since Mosser is not a party to this proceeding, it seems to be clear that he has no standing to prosecute the Petition for Certiorari, and therefore this Court is without

jurisdiction in the premises. The following cases are clear in their holding to that effect.

Louisiana v. Jack, 244 U. S. 397 (1917).

Ex Parte Leaf Tobacco v. Board of Trade, 222 U. S. 578 (1911).

South Carolina v. Wesley, 155 U. S. 542 (1895).

Guion v. Liverpool London & Globe Ins. Co., 109 U. S. 173 (1883).

Payne et al. v. Niles et al., 20 How. 219 (U. S. 1857).

In view of the fundamental principle involved we think it unnecessary to discuss these cases, on their facts.

II. THE PURPORTED PETITIONER GUILD IS LIKEWISE WITHOUT AUTHORITY OR STANDING TO PRESENT THE PETITION FOR CERTIORARI SINCE HE ALSO IS NOT A "PARTY" WITHIN THE PROVISIONS OF THE SECTION OF THE UNITED STATES CODE ABOVE CITED CONCERNING PETITIONS FOR CERTIORARI IN THIS COURT.

Petitioner Guild, a Mere Intermeddler Here.

Petitioner Guild, admits on the face of the Petition for Certiorari that he is a mere "Indenture Trustee", and *interested only in the Federal Facilities Realty Trust case*. The plain fact is he and his "Indenture" beneficiaries are fully represented by the regularly appointed Bankruptcy Trustee. Therefore he was actually an intermeddler in both the District Court and in the Court of Appeals, even in the Federal Facilities case. He has no interest whatever in the National Realty Trust proceedings.

As we have suggested above, it is a fundamental principle of law that the rights and interests of a mere "In-

indenture Trustee" in a Bankruptcy proceeding are fully protected—so far as all litigation is concerned—by the officially appointed Bankruptcy Trustees; just as all other creditors are fully represented and protected by such Trustees. Accordingly, we submit that Guild is not a lawful "party" before this Court even in the Federal Facilities case, within the provisions of the section of the United States Code cited in Point I above, which grants to this Court jurisdiction in matters pertaining to Writs of Certiorari.

While we concede that Guild as Indenture Trustee had the right to intervene in the District Court, he has no right to prosecute this Petition for Certiorari on behalf of the entire estate of Federal Facilities Realty Trust. Just as he would have no right to prosecute a plenary suit on behalf of the estate.

Kulp and Johnson Not Parties to This Proceeding.

The Court of Appeals pointed out that Guild's contentions were really directed against Darrow's two employees, Johnson and Kulp, and said with respect to them:

"They are not parties to nor represented in the proceeding now before the Court."

We feel that it is apparent the Court of Appeals regarded Guild as an interloper and entirely ignored his contentions.

In any event, we submit that Guild (like Mosser), is not a lawful "party" to this Petition for Certiorari, and has no right to invoke the jurisdiction of this Court, by attempting to join in the Petition of Mosser, the purported Trustee.

III. THE SECURITIES AND EXCHANGE COMMISSION IS FORBIDDEN BY STATUTE TO "APPEAL" IN ANY BANKRUPTCY CASE, INCLUDING A PETITION FOR CERTIORARI, YET IT IS THE REAL PROSECUTOR IN THIS PETITION.

The S. E. C. Forbidden to Appeal.

The Bankruptcy Act (Title 11, Bankruptcy, Sec. 608, U. S. C. A.) provides as follows:

"The Securities and Exchange Commission shall, if requested by the judge, and may upon its own motion, if approved by the judge, file a notice of its appearance in a proceeding under this chapter. Upon the filing of such a notice the Commission shall be deemed to be a party in interest with the right to be heard on all matters arising in such proceeding, and shall be deemed to have intervened in respect of all matters in such proceeding with the same force and effect as if a petition for that purpose had been allowed by the judge; *but the Commission may not appeal or file any petition for appeal in any such proceeding.*" (Italics added.)

The S. E. C. in the Court of Appeals.

The Securities and Exchange Commission filed a separate 27 page Brief in the Court of Appeals in opposition to Darrow's Appeal. In his brief Darrow questioned the right of the Commission to appear as a party to the Appeal but did not argue the point. However, during the oral argument one of the judges of the Court of Appeals challenged Counsel for the Commission about its statutory right to appear in that Court. But the point was passed over in the Courts' Opinion, without comment. The General Counsel of the S. E. C. in Washington, and the Regional Administrator in Chicago, both joined in a Petition for Rehearing in the Court of Appeals.

The S. E. C. as the Chief Prosecutor of This Petition for Certiorari.

Notwithstanding the express language of the Bankruptcy Act above quoted, forbidding the Securities and Exchange Commission to make any "appeal or file any petition for appeal", in such a case as this, the Record here shows the S. E. C. is the actual prosecutor of this Petition for Certiorari. In support of our statement in this respect, we have attached to this Brief certain portions of the official "Transcript of Proceedings" before the District Court on October 26, 1950, in connection with the Petition of the Trustees of Federal and National, for leave to prosecute a petition for a Writ of Certiorari in this Court.* From that "Transcript of Proceedings", it appears that Counsel for the Securities and Exchange Commission stated to the District Court that the Commission would "join in this thing"; would "file a supporting Brief" (presumably if the Writ of Certiorari is granted); would undertake the "laboring oar"; would be "prepared to go all the way on this"; would "undertake a major portion of the work involved"; and that its "Solicitor in Washington will argue the Appeal".

We respectfully submit that the Securities and Exchange Commission cannot lawfully do by indirection what Congress has expressly stated it has no right to do directly; namely, to prosecute an "appeal" in Bankruptcy proceedings, "or file any petition for appeal." Yet the S. E. C. has frankly stated that is exactly what it expects and hopes to be able to accomplish on this Petition for Certiorari. The situation presented on this point is one of vital importance and strikes at the very heart of the provisions of the United States Code with respect to Bankruptcy, to which we have referred. The unlawful position of the

* The complete original Certified Copy of that transcript has been filed with the Clerk of this Court.

Securities and Exchange Commission in this particular proceeding is all the more significant and important when, as we have shown, the lawful Trustees of Federal and National (Schwartz and Whiston, respectively) have not filed any Petition for Certiorari in this Court; and when, as we have shown, Mosser, the purported Trustee, is entirely without authority so to do. It is also significant that Guild was apparently invited to join in the Petition of Mosser, when in truth and in fact (as we have shown) Guild is not a "party" entitled to invoke the jurisdiction of this Court. What the answer is to these most unusual facts and proceedings presented by this petition, we do not know; but we earnestly submit that the Petition should be denied, if for no other reason than that it is really the Petition of the Securities and Exchange Commission.

IV. THE LACK OF MERITS IN PETITIONERS' LEGAL ARGUMENT.

We conclude this Brief by pointing out, in summary fashion, the entire lack of merits in the Legal Argument found in the Petitioners' Brief. Before coming to a discussion of the cases and authorities cited by Petitioners, there are two preliminary points to be mentioned, each of which Darrow urged strongly and successfully before the Court of Appeals, and each of which deserves to be strongly pressed in this Court.

District Court's Surcharge Entirely Punitive.

The judgment of the District Court surcharging Darrow in the sum of \$43,447.46 was entirely punitive in its nature; it was a punishment enforced against him personally, without any relation to the factor of loss to the Estates—a

factor which is always an essential and necessary element lying back of every Bankruptcy surcharge.

It is elemental law, we say, that no surcharge either in a Bankruptcy proceeding or in an ordinary proceeding in a Court of Equity, can be sustained unless the beneficiaries have suffered loss because of the wrongful conduct charged against the Trustee. One of the most recent and, we believe, one of the best statements of this rule is found in the language of the Supreme Court of Pennsylvania (1942) in *Miller's Estate*, 26 Atlantic 320. In reversing a surcharge which had been made against the Executor in that case, the Supreme Court of Pennsylvania said, in defining the term "surcharge":

"Surcharge is a penalty for failure to exercise common prudence, common skill, and common caution, in the performance of the fiduciary's duty, *and is imposed to compensate beneficiaries for loss caused by the fiduciary's want of care.*" (Italics added.)

It is essential for every lawful surcharge that there be a loss to the beneficiaries. That element of loss is entirely lacking in the case at bar, where a large profit or benefit to the Estate accrued from the very actions of the employees of the Trustee of which complaint is made.

An Unjustified Attempt to Make "New Law".

It is clear from the Petition and it's supporting Brief filed herein, and from the Transcript of Record attached to this Brief as Appendix B that the obvious purpose—and indeed the only purpose—of those who are really behind this Petition for Certiorari, is to establish "new law" concerning surcharging Trustees. This point is openly admitted by the Brief of the Petitioners (p. 14) where it is argued that if the case of *Carson, Pirie, Scott & Co. v. Turner*, 61 F. (2d) 693 "is not applicable in the

instant case, then there is no decision by this or any other court which settles the law on this issue." We deny that there is no decision in the books "which settles the law on this issue", as opposing Counsel contend. The plain fact about Counsel's theory is that there is no decision in the books which sustains it.

Such seeking after the will-o'-the-wisp of "new law" constitutes a program of theoretical and academic speculation, against which a Trustee in Bankruptcy, in Darrow's position, should not be called upon to defend himself.

In this proceeding Darrow has been compelled to defend himself as Trustee against the unfair surcharge attempted to be adjudged against him first before the Master of the District Court, next before the District Court itself, next before the United States Court of Appeals, and finally in this Court. That prolonged and costly defense is an unjust and improper burden to cast upon him.

A Case Strongly But Mistakenly Relied Upon by Petitioners.

Petitioners' argument begins ("Point I") by strongly but mistakenly relying upon the case of *Carson, Pirie, Scott & Co. v. Turner*, 61 F. (2d) 693. The facts in that case show that the rules of law on which it was decided have no pertinency or application whatever to the *Darrow* case. Nevertheless, that case, in spite of its lack of pertinency, was twice cited in the Brief of the SEC in the Court of Appeals and was strongly urged upon that Court by the SEC in its oral argument and in the Petition for Re-hearing.

When the facts of that case are analyzed, it will be seen that the statement in Petitioners' Brief (p. 13) that the decision of the Court of Appeals in the *Darrow* case "is

in direct conflict" with the *Carson, Pirie, Scott* case, is entirely unjustified. In that cited case, a Trustee in Bankruptcy had employed an auctioneer to sell the merchandise of a department store and had paid him \$2,013.00 for that work. When the Trustee filed his Account, Carson, Pirie, Scott, a creditor, objected to the compensation claimed by the Trustee and to the payment made to the auctioneer. The facts show a sordid situation as distinguished from the *Darrow* case. The auctioneer had stolen merchandise of large value to the Estate while he was serving as an employee of the Trustee. Therefore, the bankrupt estate had suffered a heavy loss. The facts also showed that while the auctioneer was stealing the merchandise from the store, affidavits had been lodged with the Trustee setting out the fact of such stealing, but the Trustee ignored the charges and permitted the auctioneer to continue in his employ. The Court of Appeals, under the circumstances, very properly ordered that the payment which the Trustee had made to the auctioneer be restored to the Estate, and further ordered that no compensation be allowed the Trustee until the question of the value of the goods stolen by the auctioneer had been determined and charged against the Trustee.

When the facts of the *Carson, Pirie, Scott* case are thus understood, it will be seen that the rules of law laid down in the case have no pertinency whatever to the *Darrow* case. In the former case, there was criminal dishonesty on the part of the Trustee's employee and loss to the Estate, and there was proof that the Trustee was warned of that guilty conduct of the employee, but took no action about it.

Petitioners Complain of the Reversal by the Court of Appeals of "Findings of Fact" of the Master and the District Court.

The next major point in Petitioners' Brief (Point II) is to the effect that the Court of Appeals "has set aside" the findings of fact of the Special Master and the District Judge. The fact is that the trial court made no "findings of fact" whatever. The record shows an extended "Memorandum and Order" of the trial court sustaining the surcharge against Darrow which had been recommended by the Master, but which contains no Findings of Fact (Rec. 577). As a matter of fact, the Court of Appeals made its own Findings of Fact, which are set out in its Opinion. It is our understanding that when a Court of Appeals makes Findings of Fact upon which it bases its judgment and decision, the Supreme Court of the United States will ordinarily not grant Certiorari.

In its Opinion, the Court of Appeals makes it very clear that it found the Master's recommendations as to Darrow's surcharge clearly erroneous. However its decision was not a reversal of any Findings of Fact by the Master or the District Court, but was a reversal of the conclusions of law of the Master, concurred in by the District Court.

Petitioners' Unsound Contention That Darrow Violated His Fiduciary Duty and Should Be Surcharged.

Pages 16 to 24 of Petitioners' Brief are devoted to the contention that Darrow violated his fiduciary duty and should be surcharged. In support of that contention, Petitioners cite seventeen cases. Most of these cases are merely cited as authorities for abstract rules of law with respect to the duties of fiduciaries. The following cases are cited

in that manner, without any discussion whatever of the facts:

Fleishhacker v. Blum, 109 F. (2d) 543 (C. C. A. 9, 1940).

Michoud v. Girod, 45 U. S. 503 (1846).

Jackson v. Smith, 254 U. S. 586 (1921).

Ex Parte Belchier, 1 Amb. 218 (27 Eng. Reprint 144).

Speight v. Gaunt, 22 Ch. 727.

Evans v. Williams, 276 Fed. 650.

In re Marcus, 2 Fed. Sup. 524.

Taylor v. Standard Gas & Electric Co., 306 U. S. 307.

Pepper v. Litton, 308 U. S. 295.

American United Mutual Life Ins. So. v. Avon Park, 311 U. S. 138.

Woods v. City National Bank & Trust Co., 312 U. S. 262.

Manufacturers Trust Company v. Becker, 338 U. S. 304.

Meinhard v. Salmon, 249 N. Y. 458.

We do not propose to expand this Brief by a discussion of the facts in each of these cases. We do say to the Court, however, that an examination of the facts will show that they are clearly distinguishable from the *Darrow* case and have little application to it.

Petitioners' Brief (p. 19) quotes at length from Scott, *The Law of Trusts*; and (pp. 19-20) from "*Restatement of the Law of Trusts*". The general statements of law quoted from these authorities are likewise not applicable here because they are not predicated upon facts such as those presented by the record in this case.

We will comment specifically upon two cases cited and discussed by Petitioners.

Petitioners quote at length (p. 18) from *Trice v. Comstock*, 120 Fed. 620. That case, when its facts are studied, will be found to have no pertinency to the *Darrow* case whatever. In that case the Court held a partner in a real estate transaction liable as Trustee *ex maleficio* because of his wrongful conduct in connection with such transaction. It is obvious, therefore, that it has no application to a case in which a surcharge is sought to be imposed upon a Bankruptcy Trustee on the facts presented by the record in the case at bar.

Petitioners also cite and quote from *Magruder v. Drury*, 235 U. S. 106, in an attempt to avoid the effect of the finding by the Court of Appeals that these two Bankruptcy Estates here, had profited substantially from the activities of Darrow's employees, because of which Darrow was surcharged by the District Court. In so doing, the Petitioners' Brief quotes from that case only the language that "it makes no difference that the Estate was not the loser in the transaction".

It is with some reluctance that we point out that this "lifted" quotation gives a totally wrong impression of the holding of the Court in the *Magruder v. Drury* case. There the main question presented was whether certain "commissions" which the Trustee had received on securities purchased from his own real estate firm constituted illegal profits which he must return to the Estate he was administering. Drury, the Trustee, was a member of a firm of real estate brokers from which the securities in question were purchased for the Estate, and he charged the Estate the "commissions" in question on those sales. In the holding that Drury, as Trustee, was personally liable for such "commissions", this Court said:

"It is well settled that a Trustee can make no profits out of his Trust. * * *

It makes no difference that the Estate was not a loser in the transaction or that the commissions were

no more than the services were reasonably worth. It is the relation of the Trustee to the Estate which prevents his dealing in such a way as to make a personal profit for himself."

When the totally different facts in the *Magruder v. Drury* case are considered, and particularly when the full statement from the Court's opinion is read without "lifting", it will be seen that the case in no way supports Petitioners' contentions in the case at Bar.

Conclusion.

We respectfully urge this Court to dismiss or deny the Petition for Certiorari for the following reasons:

1. Neither of the Petitioners here are lawful "parties" entitled to invoke the jurisdiction of this Court in this proceeding.
2. Because of the lack of lawful parties, this Court has no jurisdiction to consider the Petition.
3. The Petition is actually being prosecuted by the Securities and Exchange Commission, which by statute is forbidden to prosecute Appeals or Petitions for Review in Bankruptcy cases.
4. On the facts and the law applicable thereto, the decision of the United States Court of Appeals is sound and should stand.

Respectfully submitted,

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APPENDIX.

1

APPENDIX A.*

ORDER NO. 1.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION.

In the Matter of
NATIONAL REALTY TRUST
A Common Law Trust,

Debtor.

In proceedings for
reorganization.
No. 58335

ORDER APPOINTING ADDITIONAL TRUSTEE

This matter coming on to be heard upon the report of Martin Ward, Referee in Bankruptcy as Special Master, filed herein October 27, 1949, concerning the status of the proceedings and the matter of appointing an additional trustee;

And it appearing to the court that an order has been previously entered herein approving the petition as having been properly filed under Section 77B of the Acts of Congress relating to Bankruptcy; and that Paul E. Darrow, subsequent thereto, was appointed trustee of the debtor herein, and that thereafter Paul E. Darrow resigned in August of 1943, and Stacy C. Mosser was appointed successor trustee and is now acting in said capacity;

And the court being fully advised in the premises,

FINDS:

That the amount of property of the subsidiaries of the debtor is large and many complex administrative questions are involved, and that it would be for the best interests of this estate and its creditors if an additional trustee was appointed.

IT IS THEREFORE ORDERED AND DECREED that Frank Whiston is appointed as an additional trustee of the debtor and its property.

The additional trustee shall, within five days, enter into a bond to the United States in the sum of Twenty-Five Thousand Dollars, with sureties to be approved by the court, conditioned for the faithful performance of his official duties.

The trustees shall:

1. take into their possession and control all of the property, assets and business of the debtor, wherever located;
2. prepare and file, within 30 days hereof, a full and complete inventory of the debtor's estate;
3. keep, in accordance with good accounting practices, regular accounts showing all amounts received and from what source and all amounts expended and on what accounts;
4. file with the court a report in writing as to the condition of the estate and the amount of money on hand within the first month hereafter, and every month thereafter;

* The originals of the Certified Copies of the following five Court Orders have been filed with the Clerk of this Court, in this case.

5. account for and pay over all interest, commissions and moneys received upon the property of the estate;

6. continue to investigate the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business, and the desirability of the continuance thereof, and report thereon to the judge with all convenient speed, and to that end may examine the directors and officers of said debtor, and any other witnesses, concerning said matters or any of them;

7. report to the judge any facts ascertained pertaining to fraud, misconduct, mismanagement, and irregularities and to any causes of action available to the estate.

The trustees shall have the power:

1. to operate the business and manage the property of the said debtor until the further order of the court, including therein, but not limiting, the generality of the foregoing power and powers:

a. to do all things necessary or convenient in the operation and conduct of said business and in the maintenance and preservation of said estate;

b. to preserve, maintain and keep the property of the debtor in good condition and repair;

c. to buy and sell, either for cash or credit, such merchandise, supplies, furniture, equipment, or other property as may be necessary or advisable in the administration, preservation, maintenance, and conduct of the debtor's business;

d. to perform or cancel existing contracts of the debtors;

e. to employ, discharge, and to pay compensation, salaries, and wages of agents, servants and employees, who may be officers of the debtor, as they deem necessary or advisable in connection with the administration, preservation, maintenance, and operation of the property, assets, and business of the debtor;

f. to pay the salaries and wages of agents, employees, laborers, and servants of the debtor, accrued or to accrue, so far as the trustees may deem it necessary or expedient to avoid detriment to the working organization of said business;

g. to pay all taxes due, or to become due, on debtor's property, as well as all state franchise and sales taxes and all federal taxes or other impositions necessary by state or federal law;

h. to institute, prosecute, and maintain suits or proceedings at law, in equity, or under statute, in any court of competent jurisdiction, for the recovery, protection, or maintenance of the property, assets, and business of the debtor or of the trustees; and

i. to continue to defend any pending actions or suits in which the debtor or the trustees may have any interest as plaintiff, defendant, or otherwise.

The additional trustee, Frank Whiston, is hereby authorized and directed to exercise full voting rights of any and all stock owned by the debtor of the following corporations:

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Armour Station Building Corporation,
Berwyn Post Office Building Corporation,
Division and LaVergne Building Corporation,
Grand Rapids Parcel Post Building Corporation,
LaGrange Post Office Building Corporation,
Ogden Park Post Office Building Corporation,
Park View Manor Building Corporation,
Postal Facilities, Inc., a corporation, 6929 North Clark
Street Building Corporation, 6748 Crandon Avenue Build-
ing Corporation, and Windsor Shore Building Corpora-
tion.

The court reserves full right and jurisdiction to make, from time-to-time, such orders amplifying, extending, limiting, or otherwise modifying this order as to the court may seem proper.

ENTER:

Judge Campbell

Dated: November 7, 1949.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
Eastern Division**

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an order appointing additional Trustee made and entered in said Court on the 7th day of November, A. D. 1949 as fully as the same appears of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 2nd day of January, A. D. 1951.

Roy H. Johnson

Clerk.

[SEAL]

By E. B. Davis,

Deputy Clerk.

ORDER NO. 2

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In the matter of
FEDERAL FACILITIES REALTY TRUST,
a common law trust,

Debtor

In proceedings for
reorganization
No. 58334.

ORDER APPOINTING ADDITIONAL TRUSTEE

This matter coming on to be heard upon the report of Martin Ward, Referee in Bankruptcy as Special Master, filed herein October 27, 1949, concerning the status of the proceedings and the matter of appointing an additional trustee;

And it appearing to the court that an order has been previously entered herein approving the petition as having been properly filed under Section 77B of the Acts of Congress relating to Bankruptcy; and that Paul E. Darrow, subsequent thereto, was appointed trustee of the debtor herein, and that thereafter Paul E. Darrow resigned in August of 1943, and Stacy C. Mosser was appointed successor trustee, and is now acting in said capacity;

And the court being fully advised in the premises,

FINDS:

That the amount of property of the subsidiaries of the debtor is large and many complex administrative questions are involved, and that it would be for the best interests of this estate and its creditors if an additional trustee was appointed.

IT IS THEREFORE ORDERED AND DECREED that Joseph Schwartz is appointed as an additional trustee of the debtor and its property.

The additional trustee shall, within five days, enter into a bond to the United States in the sum of Twenty-Five Thousand Dollars, with sureties to be approved by the court, conditioned for the faithful performance of his official duties.

The trustees shall:

1. take into their possession and control all of the property, assets and business of the debtor, wherever located;
2. prepare and file, within 30 days hereof, a full and complete inventory of the debtor's estate;
3. keep, in accordance with good accounting practices, regular accounts showing all amounts received and from what source and all amounts expended and on what accounts;
4. file with the court a report in writing as to the condition of the estate and the amount of money on hand within the first month hereafter, and every month thereafter;
5. account for and pay over all interest, commissions and moneys received upon the property of the estate;
6. continue to investigate the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business, and the desirability of the continuance thereof, and report thereon to the judge with all convenient speed, and to that end may examine the directors and officers of said debtor, and any other witnesses, concerning said matters, or any of them;
7. report to the judge any facts ascertained pertaining to fraud, misconduct, mismanagement, and irregularities and to any causes of action available to the estate.

The trustees shall have the power:

1. to operate the business and manage the property of the said debtor until the further order of the court, including therein, but not limiting, the generality of the foregoing power and powers:

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a. to do all things necessary or convenient in the operation and conduct of said business and in the maintenance and preservation of said estate;

b. to preserve, maintain and keep the property of the debtor in good condition and repair;

c. to buy and sell, either for cash or credit, such merchandise, supplies, furniture, equipment, or other property as may be necessary or advisable in the administration, preservation, maintenance and conduct of the debtor's business;

d. to perform or cancel existing contracts of the debtor;

e. to employ, discharge, and to pay compensation, salaries, and wages of agents, servants and employees, who may be officers of the debtor, as they deem necessary or advisable in connection with the administration, preservation, maintenance, and operation of the property, assets, and business of the debtor;

f. to pay the salaries and wages of agents, employees, laborers, and servants of the debtor, accrued or to accrue, so far as the trustees may deem it necessary or expedient to avoid detriment to the working organization of said business;

g. to pay all taxes due, or to become due, on debtor's property, as well as all state franchise and sales taxes and all federal taxes or other impositions necessary by state or federal law;

h. to institute, prosecute, and maintain suits or proceedings at law, in equity, or under statute, in any court of competent jurisdiction, for the recovery, protection, or maintenance of the property, assets, and business of the debtor or of the trustees; and

i. to continue to defend any pending actions or suits in which the debtor or the trustees may have any interest as plaintiff, defendant, or otherwise.

The additional trustee, Joseph Schwartz, is hereby authorized and directed to exercise full voting rights of any and all stock owned by the debtor of the following corporations:

Chicago Post Office Service Building Corporation,
Columbus Parcel Post Building, Inc.,
Station "D" Post Office Building Corporation,
Dallas Parcel Post Station, Inc.,
Ferry Station Post Office, Inc.,
Irving Park Post Office Building Corporation,
McKinley Park Station Building Corporation,
North Halsted Post Office Building Corporation,
Quincy Station Post Office Building Corporation,
Roseland Building Corporation,
United States Building Corporation,
South Side Post Office Service Building Corporation,
Twenty-Second Street Station Building Corporation, and
Villa Building Corporation.

The court reserves full right and jurisdiction to make, from time-to-time, such orders amplifying, extending, limiting, or otherwise modifying this order as to the court may seem proper.

ENTER:

Judge Campbell

Dated: November 7, 1949.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
Eastern Division**

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an order appointing additional Trustee made and entered in said Court on the 7th day of November, A. D. 1949 as fully as the same appears of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 2nd day of January, A. D. 1951.

Roy H. Johnson,

Clerk

By E. B. Davis,

Deputy Clerk.

[SEAL]

**ORDER NO. 3
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In the Matter of
NATIONAL REALTY TRUST,
a common law trust,

} In proceedings for
the reorganization
of a corporation
Debtor } No. 58335

ORDER

This cause coming on to be heard upon the verified petition of Frank M. Whiston and Stacy C. Mosser, successor trustees of the debtor herein, and upon due notice to all attorneys of record, the court being fully advised in the premises, FINDS as follows:

That Frank M. Whiston and Stacy C. Mosser are the duly qualified and acting successor trustees of the debtor herein, and that on July 3, 1950, Stacy C. Mosser tendered to this court his resignation as trustee of this debtor,

IT IS THEREFORE ORDERED BY THE COURT:

(a) That the resignation of Stacy C. Mosser as one of the trustees of this debtor filed herein on July 3, 1950, be, and the same is hereby, accepted;

(b) That Frank M. Whiston and Stacy C. Mosser are hereby directed to file their first and final joint account and report covering the period from December 1, 1949, to and including July 3, 1950, on or before December 1, 1950;

(c) That all banks in which funds of the debtor are deposited are hereby directed to accept certified copies of this order as their authority for honoring checks signed by Frank M. Whiston and

APPENDIX.

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Stacy C. Mosser, as trustees of this debtor, subsequent to July 3, 1950, and prior to the date of this order, and as their authority for honoring checks subsequent to the date of this order signed only by Frank M. Whiston, successor trustee of this debtor, until the further order of this court.

ENTER:

Judge Campbell

October 17, 1950.

Examined and recommended,

October 16, 1950.

Martin Ward,

Referee in Bankruptcy as
Special Master

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
Eastern Division

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an order made and entered in said Court on the 17th day of October, A. D. 1950 as fully as the same appears of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 2nd day of January, A. D. 1951.

Roy H. Johnson,

Clerk

By E. B. Davis,

Deputy Clerk.

[SEAL]

ORDER NO. 4.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of
FEDERAL FACILITIES REALTY TRUST,
a common law trust,

Debtor

In proceedings for
the reorganization
of a corporation
No. 58334
No. 58335

ORDER

This cause coming on to be heard upon the verified petition of Frank M. Whiston, successor trustee of National Realty Trust, and Joseph Schwartz and Stacy C. Mosser, successor trustees of Federal Facilities Realty Trust, and upon due notice to all attorneys of record, the court being fully advised in the premises, **FINDS** as follows:

1. That Paul E. Darrow, former trustee of National Realty Trust and Federal Facilities Realty Trust, appealed to the United States Court of Appeals from an order of this court entered April

12, 1949, which order surcharged Mr. Darrow with \$43,447.46, being the profits made by two of the employees of said former trustee from their dealings in the securities of these two debtors and the subsidiary corporations of each.

2. That on August 14, 1950, the United States Court of Appeals rendered its decision reversing the order of the District Court insofar as it surcharged Paul E. Darrow for said profits made by his employees, and petition for rehearing was denied by the United States Court of Appeals on September 21, 1950.

3. That the trustees of these debtors desire to appeal the decision of the United States Court of Appeals to the Supreme Court of the United States, and believe that it will be for the best interests of these trust estates to seek a reversal of the decision of the United States Court of Appeals.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Frank M. Whiston, as successor trustee of National Realty Trust, and Joseph Schwartz and Stacy C. Mosser, successor trustees of Federal Facilities Realty Trust, be and they are hereby, authorized to file a petition for certiorari in the Supreme Court of the United States praying an appeal from the decision of the United States Court of Appeals entered August 14, 1950, and to prosecute such appeal, if allowed, and to pay any and all costs and expenses necessarily incurred in connection with such petition and appeal, all such costs and expenses to be equally divided between National Realty Trust and Federal Facilities Realty Trust.

ENTER:

Judge Campbell

October 26, 1950

Examined and recommended,

October 25, 1950.

Martin Ward

Referee, as Special Master

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
Eastern Division

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an order made and entered in said Court on the 26th day of October, A. D. 1950 as fully as the same appears of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 2nd day of January, A. D. 1951.

Roy H. Johnson,

Clerk.

By E. B. Davis,

Deputy Clerk.

[SEAL]

ORDER NO. 5
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

<p>In the Matter of FEDERAL FACILITIES REALTY TRUST, a common law trust,</p>	}	<p>In proceedings for the reorganization of a corporation No. 58334</p>
		Debtor

ORDER

This cause coming on to be heard on the resignation of Stacy C. Mosser as one of the co-trustees of this debtor,

IT IS HEREBY ORDERED:

1. That the resignation of Stacy C. Mosser as one of the co-trustees of this debtor be, and the same is hereby, accepted, to become effective December 1, 1950.

2. That Joseph Schwartz and Stacy C. Mosser are hereby directed to file their first and final joint account and report covering the period from December 1, 1949 to and including November 30, 1950 on or before December 15, 1950.

3. That all bank accounts of the debtor and safety deposit boxes shall be transferred to the name of Joseph Schwartz as sole trustee of this debtor; and all banks and safety deposit vault companies are hereby directed to accept certified copies of this order as their authority for honoring checks or other documents signed solely by Joseph Schwartz as trustee on and after December 1, 1950, and until further order of this court.

ENTER:

November 29th, 1950.

Judge Campbell

Examined and recommended,

November 24th, 1950.

Martin Ward

Referee in Bankruptcy, as
 Special Master.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
Eastern Division

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an order made and entered in said Court on the 29th day of November, A. D. 1950, as fully as the same appears of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 2nd day of January, A. D. 1951.

Roy H. Johnson,

Clerk.

By E. B. Davis,

Deputy Clerk.

[SEAL]

APPENDIX.

APPENDIX B.

TRANSCRIPT OF PROCEEDINGS.* **IN THE UNITED STATES DISTRICT COURT,** **NORTHERN DISTRICT OF ILLINOIS,** **EASTERN DIVISION.**

<p>In the Matter of FEDERAL FACILITIES REALTY TRUST, and NATIONAL REALTY TRUST.</p>	}	<p>No. 58 C 334 No. 58 C 335</p>
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Proceedings had on the hearing of the above-entitled cause before the Honorable William J. Campbell, one of the judges of said court, in his courtroom, U. S. Court House, Chicago, Illinois, on October 26, 1950, at 10 'clock A. M.

Present:

Mr. J. Edgar Kelly, and
Mr. Stanley A. Kaplan, appeared on behalf of the Trustees;
Mr. Edward P. McGuire, appeared on behalf of SEC;
Mr. Irving B. Campbell, appeared on behalf of 2 security holders.

The Clerk: No. 58 C 334, In the Matter of Federal Facilities Realty Trust, and No. 58 C 335, In the Matter of National Realty Trust, Petition by the trustees for a writ of certiorari in the Supreme Court of the United States.

Mr. Kelly: If the court please, this is the motion of the trustees of Federal Facilities Realty Trust and National Realty Trust for leave to file a petition for a writ of certiorari in the United States Supreme Court requesting an appeal from the decision of the Court of Appeals involving the former trustee's, Mr. Darrow's, accounts and reports.

We feel that the decision of the Court of Appeals is erroneous and the amount in excess of \$44,000 that is involved we wish to recover for this estate. We believe that the expenditure of the money necessary to perfect this appeal if it is granted will be justified.

The Court: How much do you think will be necessary?

Mr. Kelly: For the expenditure itself?

The Court: Ycs.

Mr. Kelly: In costs?

The Court: Yes.

Mr. Kelly: As close as we can estimate without having actual figures from the printer, I believe attorneys' fees and all will be less than a thousand dollars.

The Court: The attorney fees also. Do I understand that the Securities & Exchange Commission will join in this thing?

Mr. McGuire: Yes, your Honor. We will file a supporting brief.

* The complete original Certified Copy of this Transcript of Proceedings has been filed with the Clerk of this Court, in this case.

The Court: You will file your brief incident to the trustees' brief?

Mr. McGuire: Yes.

The Court: I do not see how you can get by with a thousand dollars including attorneys' fees.

Mr. Kelly: That may be a slight misstatement, your Honor. I am figuring on the cost of binding the record.

The Court: What estimate have you from the printer?

Mr. Kelly: I have not been able to get an estimate from the printer because it is a binding job. The record is all printed. He merely has to recover and bind that record, the briefs and the opinion. There is no printing so far as the record is concerned. The petition of certiorari will probably run maybe 20 pages and just an item of about \$75.00.

The Court: Who from Washington is going to argue the case for certiorari? The SEC will have its solicitor?

Mr. McGuire: The SEC will have its solicitor there.

The Court: If the SEC is willing to undertake the laboring oar here I would be willing to approve the matter of the appeal. The only point that presents itself to me here is a different one than, of course, is presented to the SEC, Mr. McGuire. I am concerned now and must be conscientiously with the preservation of the assets of this estate. You are concerned with the state of the law in this circuit and should properly be so concerned. I am too in a general way, but in this case my duties are to this particular estate. Now to burden this estate with a tremendous cost in order to rectify the law of the circuit, if indeed it needs rectification—I do not for the record say that it does—but who am I to disagree with my better? At the same time that apparently is the opinion of your Commission?

Mr. McGuire: That is right.

The Court: Or you would not be joining in this appeal.

Is it fair to the creditors of this estate for me to undertake so large a burden? I would be persuaded in granting this petition if I knew that the major portion of the work of the appeal, the legal work, the major portion of the legal work would be undertaken by the SEC and maybe the trustees had to file only more or less pro forma in order to comply with perfecting their certiorari.

What do you have to say on that?

Mr. McGuire: We are prepared to go all the way on this, your Honor, and be as diligent as we possibly can. As I say we will file a supporting brief and assume at least a portion and argue this matter.

There is really more at issue here than the \$40,000 that has been mentioned to you. There are matters in your decree which may have a bearing on this.

The Court: On the entire estate?

Mr. McGuire: Yes.